KELLEY DRYE & WARREN LLP
A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL ASSOCIATIONS
1200 19TH STREET, N.W.
SUITE 500
WASHINGTON, D.C. 20036
(202) 955-9600

FACSIMILE
(202) 955-9792

NEW YORK, N.Y.
LOS ANGELES, CA.
MIAMI, FL.
CHICAGO, IL.
STAMFORD, CT.
PARSIPPANY, N.J.

BRUSSELS, BELGIUM
HONG KONG

AFFILIATED OFFICES
NEW DELHI, INDIA
TOKYO, JAPAN

ROBERT J. AAMOTH
DIRECT LINE (202) 955-9676
E-MAIL: raamoth@kelleydrye.com

EX PARTE OR LATE FILED

June 4, 1999

RECEIVED
JUN 04 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. Michael Pryor
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *Ex parte* Submission in CC Docket Nos. 96-98 and 98-121

Dear Mr. Pryor:

On behalf of the Competitive Telecommunications Association ("CompTel"), we are writing to offer CompTel's general support of the June 2, 1999 *ex parte* presentation of AT&T and MCI WorldCom in the above-captioned matters. CompTel agrees with AT&T and MCI WorldCom that it is necessary to create an appropriate set of performance measures geared toward nondiscriminatory service to CLECs, as well as a self-effectuating remedy plan that provides (1) sufficient financial incentives for Bell Operating Companies ("BOCs") to comply with those measures, and (2) adequate compensation to CLECs adversely affected by an ILEC's noncompliance.[1]

CompTel has submitted the proposal of AT&T and MCI WorldCom to its members and is still obtaining their response to the specific details of that proposal. Based on its members' feedback, CompTel anticipates providing the Commission with a more detailed reaction to the

1 The remedy structure should apply equally to all ILECs, not just BOCs, except remedies related to section 271 authorization. The structural separation remedies discussed herein should apply to all non-BOC ILECs at all times. For BOCs, such remedies would apply only after section 271 approval.

No. of Copies rec'd 0+3
List A B C D E

elements of that proposal in the near future. At this time, CompTel is in general agreement with the principles and performance measures contained in the AT&T/MCI WorldCom proposal.

Further, CompTel generally supports the tiered approach to remedies set forth by AT&T and MCI WorldCom, *i.e.,* so-called Baseline remedies for noncompliance vis-à-vis a single CLEC, with escalation remedies for greater levels of noncompliance under a single submetric or noncompliance with a submetric over a period of several months, and so-called Market Suppression remedies when performance results for the CLEC industry as a whole indicate endemic noncompliance. However, CompTel does not have sufficient information from its members at this time to offer support to the specific monetary remedy levels set out by AT&T and MCI WorldCom in Section II.E, II.F, III.B, and Tables A and B of their Joint Proposal.

The remedies ultimately chosen must provide a sufficient disincentive for noncompliant ILEC behavior. The remedies must generate effective incentives to comply both before and after section 271 approval. The remedies must be sufficient to deter noncompliance both with respect to large CLEC likes AT&T and MCI WorldCom, as well as small CLECs such as many of CompTel's members. In addition to providing effective deterrence, the remedies must provide some measure of compensation to the CLECs affected going beyond mere restitution. CompTel believes that it is difficult to determine accurately the full range of damage that noncompliance can cause a CLEC. The damage is much greater than the direct cost of the unbundled element involved or of the service not provided (or provided poorly) to the CLEC. As a consequence of an ILEC's non-compliance, the CLEC may lose customers, have dissatisfied customers, fail to win customers, lose revenues, and suffer generally in its reputation. Such damage is not only extremely difficult to calculate, but the effects can be long-term and particularly catastrophic for small CLECs without the financial wherewithal to weather such injuries to their business for even short periods of time. CompTel is not prepared to comment at this time whether the remedy levels advocated by AT&T and MCI WorldCom achieve the appropriate compensation, especially for smaller CLECs. As CompTel receives feedback and comment on the AT&T and MCI WorldCom proposal, it will be able to provide the Commission with a more specific position on this issue.

Regarding the second issue, CompTel differs with the Joint Proposal's suggestion that Market Suppression remedies be paid to a government-created fund. The deterrent effect of these remedies will be far greater if the moneys are paid directly to the ILECs' competitors rather than to some government-created fund. Moreover, payment directly to all CLECs[2] in the relevant market is appropriate where there is market suppressing activity. Where there is evidence of a widespread pattern of discriminatory behavior, it is virtually certain to affect *all CLECs* adversely, even if performance vis-à-vis some CLECs taken individually might not rise

---

2 The ILEC would distribute the payments among all CLECs that use the particular element, service, or function at issue during the relevant reporting period.

to the level of Baseline or Escalation remedies. This is particularly likely to be the case where a conservative Modified Z Score of –1.645 is employed to ascertain compliance, although it is probable even where a less conservative but still significant Z Score, such as –1.04, is used. Requiring the ILECs to pay Market Suppression remedies to all CLECs will ensure that such CLECs receive some compensation for the level of noncompliance they experience.

Further, CompTel foresees little chance that CLECs will be unduly enriched if they receive a share of Market Suppression remedies in addition to a Baseline and/or Escalation remedy. If the overall monetary remedy scheme is set to provide the correct level of deterrence to ILECs, the Commission should be confident that the payment of the same level of moneys to CLECs will be balanced and fair. If the levels at which remedies are set create legitimate concerns about undue enrichment – outweighing potential long-lasting damage to competition and competitors for ILEC noncompliance – then it is probable that the level of remedies is greater than necessary for effective deterrence. As explained above, it is very difficult to ensure that the full range of damage done to CLECs as result of ILEC noncompliance, especially small CLECs, will be captured by a one-size-fits-all remedy. CompTel submits, therefore, that the greater concern for the Commission is ensuring that remedies are set high enough to create an effective deterrent and, thus, have pro-competitive effect. Certainly, the three tiers of remedies should be set at levels that the Commission believes will alleviate doubts that undue enrichment will occur on a frequent basis, but it would be far worse for the development of competition if remedies are set too low.

Finally, CompTel believes greater specificity is required regarding remedies related to section 271 authority. CompTel's observations in this regard can be placed into two categories, remedies before section 271 approval and remedies after grant of such authority. Noncompliance with certain submetrics should lead to denial of an application for approval under section 271. These submetrics must be set out with specificity so that a BOC knows in advance the consequences of noncompliance. Some of these submetrics might merit section 271 denial if missed for one CLEC in a given month, or for several consecutive months, or with respect to the industry as a whole. CompTel is still awaiting specific recommendations from its members regarding which submetrics should merit such action, but it generally agrees that some specific degree of non-compliance with the submetrics in the AT&T/ MCI WorldCom proposal categorized as *Immediate Customer and Competition Affecting* must lead to automatic section 271 denial. Noncompliance with other submetrics should merit investigation and, on a case-by-case basis, may justify denial of an application for section 271 authority.

Once section 271 authority is granted, the Commission should consider a sliding scale of consequences that would reflect the severity of a BOC's failure to meet its performance standards, beyond the monetary remedies proposed by AT&T and MCI WorldCom. Those parties' proposal sets out revocation of section 271 as the only penalty in addition to the three tiers of monetary remedies. CompTel submits that a multi-tiered approach is more appropriate.

Noncompliance with certain submetrics – whether with respect to individual CLECs or the industry as a whole will depend upon the specific submetric – should lead to a suspension of the BOC's ability to market to or accept new customers until industry-wide compliance is again firmly established for a minimum number of months. Under circumstances of industry-wide noncompliance with certain submetrics, or in cases of repeated or frequent noncompliance of other submetrics, revocation of section 271 authority – including loss of existing interexchange customers – is the appropriate remedy. In order to minimize disruption to consumers, this ultimate sanction would require a higher degree or longer duration of noncompliance than that which merits denial of a section 271 application in the first instance. Finally, in other more severe circumstances, structural remedies should be considered in addition to revocation of section 271 authority.[3] For example, where an ILEC is found to have engaged in extreme and deliberate anticompetitive conduct to protect its own retail operations at the expense of non-affiliated CLECs, requiring structural separation of that ILEC's network and retail service operations should be considered as a means to effect a fundamental change in that ILEC's incentives and behavior.[4]

---

3 Structural separation, as well as the three tiers of monetary remedies, would apply to non-BOC ILECs. The structural separation remedy must change incentives and behavior of the BOC or ILEC, and might include a requirement for independent directors, a prohibition or resale of ILEC local exchange service by the interexchange affiliate, substantial public ownership of the affiliate, and a ban on the sharing of brand names, facilities, service, or employees between the local network and interexchange operations.

4 CompTel's longstanding position has been that section 272 structural separation requirements are insufficient to address ILEC anticompetitive behavior against CLECs in the local market. Thus, CompTel has proposed additional structural safeguards, including: (1) a prohibition on the resale of ILEC local exchange service by the retail affiliate; (2) substantial public ownership of the retail affiliate; (3) the presence of independent directors on the board of the affiliate; and (4) a ban on joint marketing or joint ownership of network facilities, functions, services, or employees by the ILEC wholesale and retail affiliates. *E.g.,* Comments of the Competitive Telecommunications Association, CC Docket No. 98-147, filed Sept. 25, 1998.

In sum, CompTel is in general agreement with the approach taken by AT&T and MCI WorldCom, with the exceptions as discussed herein. Moreover, until CompTel receives feedback on the AT&T/MCI WorldCom *ex parte* from its members, it is unable to provide more specific recommendations. CompTel looks forward to the opportunity to offer more detailed input in the near future.

Respectfully submitted,

Robert J. Aamoth
Edward A. Yorkgitis, Jr.

cc: Eric Einhorn
Jake Jennings
Andrea Kearney
Claudia Pabo
Daniel Shiman